

May 20, 2009

SEC Approves Proposal for Shareholder Proxy Access

At an open meeting this morning, the Securities and Exchange Commission approved, by a vote of three to two, proposed rules to federalize shareholder access to company proxy materials. Despite strong objections by two Commissioners to this federal incursion into traditional areas of state corporate law, the majority approved the proposed rules as a means to enhance “director accountability” in response to the current economic crisis. If adopted, the new federal rules will effectively sweep aside the recent Delaware legislation allowing shareholder proxy access, as well as current efforts to modify the Model Business Corporation Act in that regard, and bring to an end the possibility of shareholders and American corporations working together to develop new norms and practices in this area.

While we continue to believe that broad proxy access may well dangerously weaken boards of directors and American public companies, it is now clear that it will become a part of our public company landscape. However, we strongly support the view expressed by Commissioner Paredes that the SEC should act judiciously, and with appropriate respect and comity for the role of the states in our federal system, by amending Rule 14a-8 to support the efforts of Delaware and other states to allow companies and their shareholders to agree on proxy access approaches that make sense for each company, rather than adopting a one-size-fits-all mandatory federal rule. This is especially the case as the premise of the SEC’s rulemaking initiatives – that corporate governance mechanisms facilitating greater shareholder oversight may have mitigated some of the causes of the recent economic crisis – is a subject of hot debate. Indeed, Commissioner Casey vociferously rejected this premise and her view is supported by academic and other commentators. See our recent memorandum [“A Crisis is a Terrible Thing to Waste: The Proposed “Shareholder Bill of Rights Act of 2009” Is a Serious Mistake.”](#)

As outlined at the SEC meeting, proposed new Rule 14a-11 would allow shareholders or groups of shareholders owning as little as one percent of a company’s shares for one year to require inclusion on the company’s proxy card and in its proxy statement for each meeting director candidates for up to one-quarter of the board. For companies that are not large accelerated filers, the thresholds would be either 3% or 5% depending on size. The SEC is proposing a first-to-file rule if more than the permitted number of nominations is received. By contrast, in our [model Delaware bylaw](#), we proposed that 5% shareholders each be able to nominate one director, up to *one-third* of the directors to be elected *at each election*; and we proposed that deference be given to larger stockholders if nominations are oversubscribed. Under the SEC proposal, candidates will be required to be independent under the applicable stock exchange standards, but will not have to be independent of their nominators. The Staff has indicated that the proposal is not intended to enable shareholder access to be used as a “Trojan Horse” for takeover activity and would require nominators to certify that they do not have a current intent to take control of the company (although they may change their minds once their candidates are on the board). Our proposed bylaw, by contrast, seeks to prevent the access regime being abused to support takeover bids by, *inter alia*, requiring nominating shareholders to agree that they will not take any steps towards a takeover for one year following the election.

The SEC will be issuing its proposed rules shortly and will provide a 60-day period for public comments. While comments are expected to be substantial, the SEC may seek to adopt final rules in time for the 2010 proxy season.

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